

1 Hospital where his injuries were confirmed (id.). Plaintiff asserted that he at no time
2 struggled or resisted Defendants and that they used objectively unreasonable force against
3 him. According to Plaintiff, he suffered severe nerve damage, lower lumbar separation, and
4 back pain as a result (id.).

5 Defendants now move to dismiss Plaintiff's First Amended Complaint on the ground
6 that the claim against them is barred by the statute of limitations (Doc. 20). Defendants
7 contend that Plaintiff's claim accrued the date of his arrest—February 24, 2009—because
8 he was immediately aware of his injury and who caused it (id. at 2). They submit that
9 because he did not file his initial complaint until May 27, 2011, more than two years later,
10 his claim is time-barred (id. at 1-2).

11 The Court issued an Order notifying Plaintiff of his obligation to respond to
12 Defendants' motion and of the Local Rules of Civil Procedure governing motion practice
13 (Doc. 17). In lieu of a response, Plaintiff filed a motion seeking appointment of counsel and
14 a three-month continuance so that he could obtain counsel to help him through the legal
15 process (Doc. 18). On April 9, 2012, the Court denied Plaintiff's motion, finding no
16 exceptional circumstances for appointment of counsel and no good cause for an extension
17 (Doc. 20).

18 To date, Plaintiff has not filed a response to Defendants' motion. The time for
19 responding has expired, and the motion is ready for ruling.

20 **II. Statute of Limitations**

21 **A. Legal Standard**

22 A statute-of-limitations defense may be raised in a motion under Federal Rule of Civil
23 Procedure 12(b)(6) if the running of the statute is apparent on the face of the complaint.
24 Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980). When considering a motion
25 to dismiss under Rule 12(b)(6), courts must "accept as true the facts alleged in the
26 complaint," Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1171 (9th Cir. 1999), and
27 "must draw inferences in the light most favorable to the plaintiff." Barker v. Riverside
28 County Office of Ed., 584 F.3d 821, 824 (9th Cir. 2009) (citation omitted).

1 Federal courts borrow state statutes of limitations for personal injury actions in § 1983
 2 suits. See Wallace v. Kato, 549 U.S. 384, 387 (2007); Lukovsky v. City of S.F., 535 F.3d
 3 1044, 1048 (9th Cir. 2008). Under Arizona law, a claimant has two years to raise a personal
 4 injury claim before the statute of limitations runs. Ariz. Rev. Stat. § 12-542. Federal law
 5 determines when a cause of action accrues and the statute of limitations begins to run for a
 6 § 1983 claim. Lukovsky, 353 F.3d at 1048. Under federal law, a claim accrues “when the
 7 plaintiff knows or has reason to know of the injury which is the basis of the action.” Id.
 8 (quotation omitted).

9 The Court must also apply any state rule for tolling to actions brought under § 1983.
 10 See Hardin v. Straub, 490 U.S. 536, 544 (1989); Johnson v. State of Cal., 207 F.3d 650, 653
 11 (9th Cir. 2000); TwoRivers v. Lewis, 174 F.3d 987, 992 (9th Cir. 1999). Under Arizona law,
 12 the limitation period is tolled during mandatory exhaustion of administrative remedies. See
 13 Ariz. Dep’t of Revenue v. Dougherty, 29 P.3d 862, 869 (Ariz. 2001); see also Brown v.
 14 Valoff, 422 F.3d 926, 243 (9th Cir. 2005) (“the applicable statute of limitations must be
 15 tolled while a prisoner completes the mandatory exhaustion process”).

16 **B. Analysis**

17 Plaintiff’s excessive-force claim accrued on February 24, 2009—the date he was
 18 allegedly assaulted and injured by Defendants (Doc. 9 at 3). See Cabrera v. City of
 19 Huntington Park, 159 F.3d 374, 380-81 (9th Cir. 1998) (per curiam) (finding that excessive
 20 force claim accrued on the date of the arrest and assault). As Plaintiff averred in his First
 21 Amended Complaint, because the alleged excessive force occurred during his arrest and prior
 22 to any incarceration, there was no requirement to exhaust remedies (Doc. 9 at 3). Thus, there
 23 is no tolling of the statute of limitations, and it expired two years after Plaintiff’s arrest on
 24 February 24, 2011. The docket reflects that Plaintiff did not file this lawsuit until May 25,
 25 2011 (Doc. 1 at 6). See Houston v. Lack, 487 U.S. 266, 270-72 (1988) (pro se prisoner filing
 26 is dated from the date a prisoner hands it to a prison official for mailing); Douglas v. Noelle,
 27 567 F.3d 1103, 1109 (9th Cir. 2009) (the Houston mailbox rule applies to pro se prisoner
 28 § 1983 complaints).

1 Although Plaintiff acknowledges in his motion for appointment of counsel that he
2 received a copy of the motion to dismiss, he failed to file a response to the statute-of-
3 limitations argument. Plaintiff was specifically notified that failure to respond “may in the
4 discretion of the Court be deemed a consent to the granting of that Motion” (Doc. 17 at 2).
5 See LRCiv 7.2(i).

6 Accordingly, the Court finds that Plaintiff’s excessive-force claim is time-barred, and
7 Defendants’ motion will be granted. See Cervantes v. City of San Diego, 5 F.3d 1273, 1276-
8 77 (9th Cir. 1993) (where the running of the statute of limitation is apparent on the face of
9 the complaint, dismissal for failure to state a claim is proper).

10 **IT IS ORDERED:**

11 (1) The reference to the Magistrate Judge is **withdrawn** as to Defendants’ Motion to
12 Dismiss (Doc. 15), and the Motion is **granted**.

13 (2) The Clerk of Court must enter judgment of dismissal accordingly.

14 (3) For the reasons set forth herein, pursuant to 28 U.S.C. § 1915(a)(3), an appeal
15 from the judgment in this action would not be taken in good faith.

16 DATED this 1st day of May, 2012.

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20 Robert C. Broomfield
21 Senior United States District Judge
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